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Nos. 94-1620 and 94-1621

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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WILLIAM E. KIRWAN *et al.*,
*Petitioners,*

v.

DANIEL J. PODBERESKY,
*Respondent.*

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MONICA GREENE *et al.*,
*Petitioners,*

v.

DANIEL J. PODBERESKY,
*Respondent.*

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF OF INSTITUTIONS OF HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

(Institutions Listed on Inside Cover)

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## LIST OF INSTITUTIONS JOINING THIS BRIEF *

UNIVERSITY OF ARKANSAS
BAYLOR UNIVERSITY
GEORGETOWN UNIVERSITY
UNIVERSITY OF HAWAII
UNIVERSITY OF ILLINOIS
UNIVERSITY OF MICHIGAN
UNIVERSITY OF MISSOURI
UNIVERSITY OF MONTANA
UNIVERSITY OF NEW MEXICO
NORTHWESTERN UNIVERSITY
THE OHIO STATE UNIVERSITY
OREGON SYSTEM OF HIGHER EDUCATION
UNIVERSITY OF RHODE ISLAND
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY
UNIVERSITY OF TEXAS SYSTEM
TEXAS A&M UNIVERSITY SYSTEM
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OHIO NORTHERN UNIVERSITY, CLAUDE W. PETTIT COLLEGE OF LAW
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TOURO COLLEGE, JACOB D. FUCHSBERG LAW CENTER

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* There are no parent or subsidiary companies within the meaning of Rule 29.1.

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 4

I. RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS ARE WIDESPREAD AT INSTITUTIONS OF HIGHER EDUCATION AND SERVE IMPORTANT INSTITUTIONAL GOALS WITHOUT UNDULY BURDENING OR DIMINISHING THE OPPORTUNITIES OF INELIGIBLE STUDENTS ..... 4

II. UNDER THE FOURTH CIRCUIT'S APPROACH TO RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS, FEW WOULD SURVIVE ..... 8

CONCLUSION ..... 12

## TABLE OF AUTHORITIES


CASES: Page

*Brown* v. *Board of Education*, 347 U.S. 483 (1954) ..... 2

*Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990) ..... 5

*Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) ..... 5, 11

*United States* v. *Fordice*, 112 S. Ct. 2727 (1992) ..... 5

*Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986) ..... 10, 11

STATUTES:

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988) ..... 2, 5

Montana Code Ann. § 20-25-421(4)(a) (1993) ..... 7

OTHER AUTHORITIES:

Montana Board of Regents Policy 940.13.d (1994) .. 7

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance (Dep't of Ed.), 56 Fed. Reg. 64548 (Dec. 10, 1991) ..... 4

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Notice of final policy guidance (Dep't of Ed.), 59 Fed. Reg. 8756 (Feb. 23, 1994) ..... 4, 5, 6

United States General Accounting Office, "Higher Education: Information on Minority-Targeted Scholarships" (January 1994) (GAO/HEHS-94-77) ..... 4, 8

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## BRIEF OF INSTITUTIONS OF HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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### INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

This brief is submitted on behalf of twenty-seven institutions of higher education—listed on the inside cover of this brief—that wish to support the granting of writs of certiorari so that the decision of the Fourth Circuit in

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[1] The parties' written consents to the filing of this brief are being filed today with the Clerk of the Court.

this case may be reviewed by this Court.[2] Many of the institutions joining this brief have race-specific or minority-specific scholarship programs of their own. While these programs take many different forms and have been adopted by institutions with different circumstances and histories, they share a common characteristic: they have proven to be effective tools in attracting and retaining minority students.

Like the University of Maryland at College Park ("UMCP"), some of these institutions had a history of legal segregation before *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and have been subject to proceedings and negotiations with the Office of Civil Rights of the Department of Education (and its predecessor) for many years after the passage of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, aimed at ensuring that the previously segregated system has been disestablished and the effects of prior discrimination eliminated. Some of these institutions—like UMCP—partly justify their race-specific scholarship programs as efforts to remedy past discrimination in response to enforcement proceedings instituted by the Office of Civil Rights in the past. The rejection by the Fourth Circuit of the "remediation justification" put forward by UMCP —in spite of the extensive evidence that the University assembled in support of its program—may jeopardize such programs at institutions that have been targeted by the Federal Government for enforcement proceedings under Title VI in the past.

Other institutions joining this brief do not have histories of segregation or believe that they have already

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[2] The decisions in the lower courts appear at 764 F. Supp. 364 (D. Md. 1991) (App. 109a) (granting defendants' motions for summary judgment), 956 F.2d 52 (4th Cir. 1992) (App. 96a) (reversing and remanding), 838 F. Supp. 1075 (D. Md. 1993) (App. 34a) (granting defendants' motions for summary judgment), and 88 F.3d 147 (4th Cir. 1994) (App. 1a) (vacating and remanding with directions to grant plaintiff's motion for summary judgment).

remedied past discrimination. They justify their race-specific or minority-specific programs solely or principally as legitimate efforts to promote or achieve a diverse student body, or expect in the future to justify their programs on these grounds. Those institutions fear that the Fourth Circuit's ruling, including its cursory treatment of UMCP's contention that its scholarship program was justified in part on diversity grounds, also places in legal jeopardy their own scholarship programs.

Finally, other institutions do not have race-specific or minority-specific scholarship programs at the present time, but support the institutional and societal objectives served by such programs and wish to be free to adopt such programs in the future.

All of the institutions joining this brief are troubled by the implications and effects of the Fourth Circuit's decision and urge its consideration by this Court. Race-specific scholarships have been an essential weapon in the arsenal of techniques used by colleges and universities to attract minority students and to retain them once they are admitted. Today, when the number of qualified minority students enrolled at many institutions of higher education is declining, the need for carefully targeted minority financial aid remains as high as ever. The Fourth Circuit's decision fails to provide useful guidance for race-specific scholarship programs but instead virtually slams the door on such programs, sending an unmistakable warning both to the administrators of such programs and to students of all races. The effects of the decision could be devastating to the effort—barely more than a generation old—to increase the participation of minority students at American colleges and universities.

The petitioners have already briefed the facts of this case in detail and demonstrated the ways in which the Fourth Circuit's decision diverged from well-established law in this area. In addition, the petitions and the briefs of other *amici* demonstrate well the national importance

of this case. The institutions joining this brief support the petitions. In what follows, we highlight the importance of the case to institutions of higher education and some of the difficulties posed by the Fourth Circuit's decision.

## ARGUMENT

### I. RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS ARE WIDESPREAD AT INSTITUTIONS OF HIGHER EDUCATION AND SERVE IMPORTANT INSTITUTIONAL GOALS WITHOUT UNDULY BURDENING OR DIMINISHING THE OPPORTUNITIES OF INELIGIBLE STUDENTS.

In 1991, in soliciting comments on proposed policy guidance on nondiscrimination in student financial aid, the Department of Education took note of evidence from the American Council on Education ("ACE") showing that "approximately 3.5 percent—about 45,000—of all minority students at four-year colleges receive 'race-exclusive scholarships', that is, scholarships for which students of only a designated race or national origin may compete." According to the ACE, "colleges most often offer race-exclusive scholarships in order to increase the diversity of their student populations." 56 Fed. Reg. 64548 (Dec. 10, 1991).

By the time the Department issued its final policy guidance in 1994, 59 Fed. Reg. 8756 (Feb. 23, 1994), the General Accounting Office had studied the matter and reported that 64 percent of all undergraduate schools, 32 percent of graduate schools, and 72 percent of all professional schools had one or more minority-targeted scholarships.[3]

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[3] United States General Accounting Office, "Higher Education: Information on Minority-Targeted Scholarships" (January 1994) (GAO/HEHS-94-77) at 59, Table III.2. The Report (at 1) defines "minority-targeted scholarships" as "scholarships for which some form of minority status is an eligibility requirement."

It is obvious from these figures that many institutions of higher education have found minority-specific scholarship programs necessary and appropriate to serve important educational and institutional values. For institutions that, like UMCP, have an acknowledged history of segregation, eliminating current effects of past discrimination is of course an appropriate goal—indeed one required by law. In determining whether states have discharged that obligation, this Court has consistently asked "whether existing racial identifiability is attributable to the State and examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system." *United States* v. *Fordice*, 112 S. Ct. 2727, 2735 (1992). Many institutions, like UMCP, have decided that a limited number of race-specific scholarships appropriately advance that important goal without running afoul of the Fourteenth Amendment or Title VI. The Department of Education expressly recognizes the appropriateness of race-specific scholarships in achieving this goal, so long as there is a "strong basis in evidence" for concluding that the college's action is "necessary to remedy the effects of its past discrimination." 59 Fed. Reg. at 8757.

In addition, for institutions of higher education that have adopted race-specific or minority-specific programs —both those that have a history of past discrimination and those that do not—those programs serve the important goal of furthering the "attainment of a diverse student body," the goal identified in *Bakke* as "a constitutionally permissible goal for an institution of higher education." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J.). See also *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990) ("a 'diverse student body' contributing to a '"robust exchange of ideas"' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated * * *").

Attainment of a diverse student body at a university serves important educational goals. As the Department of Education observed, many colleges "seek to create on campus an intellectual environment that reflects" the nation's own diversity, as "America * * * has forged one Nation from many people of a remarkable number of different backgrounds." 59 Fed. Reg. at 8757. Such a diverse intellectual environment benefits students of *all* races and backgrounds. The UMCP Decision and Report Regarding the Benjamin Banneker Scholarship Program (hereinafter the "Report"), reproduced in the Appendix to the petitions at pp. 139a-220a, not only states UMCP's commitment to a diverse student body to further its educational goals, but demonstrates that other institutions share that commitment, quoting affidavits in the record from Donna E. Shalala, then Chancellor of the University of Wisconsin-Madison and now Secretary of the Department of Health and Human Services (App. 213a-214a), William H. Danforth, Chancellor of Washington University (App. 215a-216a), and Sheldon Hackney, then President of the University of Pennsylvania and now Chair of the National Endowment for the Humanities (App. 215a, n.126). Ms. Shalala stated that her own university "cannot provide a quality education—that is, an education which will prepare students to live, work and provide leadership in the United States—without the active participation of and exposure to a diverse student body." App. 214a. Dr. Danforth said:

> "While *de jure* segregation is a thing of the past (albeit the recent past), the attitudes and stereotypes that accompanied legal segregation have not disappeared. Changes in beliefs and attitudes require time and education. We think it important that American institutions, in partnership with government, take active steps to make these institutions places where African Americans feel welcome and to continue the work of dismantling old ideologies and prejudices." App. 215a.

Such quotations could be multiplied endlessly, but we believe that the importance that institutions have long placed on a diverse student body is not a matter of serious dispute.

To attain desirable student diversity, many institutions —like UMCP—have decided that one appropriate tool is the race-specific or minority-specific scholarship. Dr. Danforth, in the affidavit just quoted, reported that the number of African Americans who applied to Washington University tripled after a scholarship program targeted at African Americans, and awarded to up to ten freshmen each year, was instituted in 1987.[4] UMCP adopted another form of such a program. Its Banneker Scholarship Program awards twenty to thirty full scholarships per year to high-achieving black students already selected for admission and encompasses about one percent of financial aid moneys available to UMCP students. Other institutions may target different groups—Asian Americans, Hispanics, Native Americans,[5] or other race or minority groups—and may have programs that are considerably more limited in number, covering only one or two students. Isolated instances of race-specific or minority-specific scholarships may arise at a university because committed graduates or other philanthropists may have contributed money in honor of a prominent graduate. Moreover, while UMCP decided to award its Banneker

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[4] Affidavit of William H. Danforth, UMCP Decision and Report Exhibit 68, ¶¶ 8-12.

[5] For example, the State of Montana specifically authorizes the University of Montana system to waive tuition and fees for persons of one-fourth Indian blood in residency in the State. Montana Code Ann. § 20-25-421(4)(a) (1993). Pursuant to that authority, the Montana Board of Regents has required all public university campuses to give tuition and fee waivers to such persons when they meet financial need prerequisites. Montana Bd. of Regents Policy 940.13.d (1994). The University's main campus in Missoula has granted an average of 173 waivers annually over the past few years pursuant to this policy.

Scholarships regardless of need, other institutions continue to require a showing of need, even where particular scholarships are limited to members of particular groups.

With all the variations in the form of race-specific or minority-specific scholarships, and with all the variations in the histories and philosophies of the institutions that have adopted them, such programs typically provide a small percentage of the total scholarship money available to students and award money to a small percentage of the minority students at the institution.[6] These scholarships ordinarily and demonstrably supplement existing scholarship programs, rather than taking money away from existing programs. The money for the scholarships often has been donated for the specific purpose advanced by the particular scholarship, so that there is no good reason to believe that the money would nevertheless have been available had the institution refused to accept it as funding for a race-specific or minorty-specific scholarship. Thus, not only do these scholarships serve important institutional goals at the institutions that have adopted them, but they do so in a limited way that imposes little or no direct "burden" on ineligible students.

## II. UNDER THE FOURTH CIRCUIT'S APPROACH TO RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS, FEW WOULD SURVIVE.

Faced with a lawsuit challenging its race-specific scholarship program, UMCP undertook a careful review of the program and issued a 71-page Decision and Report with 69 exhibits. App. 139a-220a. That Decision and Report summarized the University's history of discrimination against African Americans; examined the available evidence that significant present effects of past discrimination continued to exist at the University, concluding that such effects do exist; pointed out the minimal effect of

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[6] See GAO Report, *supra*, at 4-5 & 60, Table III.4.

the program on ineligible students; demonstrated that other programs to recruit and retain minority students have not been as successful as hoped, while the Banneker program has proved effective; and committed itself to review the need for the program every three years (see App. 212a). While that Decision and Report convinced the district court that UMCP's program was justified under this Court's decisions, the Fourth Circuit ruled the program unlawfully discriminatory in an opinion that gives little or no credit to the University's effort, rejects some justifications as a matter of law, and finds the Banneker Program "not narrowly tailored" to remedy past discrimination.

It is hard for the institutions of higher education that have a direct interest in these issues to read the Fourth Circuit's decision as signalling anything other than extreme judicial hostility to *any* race-specific or minority-specific scholarship program an institution might offer—no matter what justification and evidence the institution assembles in its defense and no matter how limited the program in relation to other financial aid offered by or through the institution. No institution of higher education that justifies its own race-specific or minority-specific scholarship program as a reasonable means to achieve diversity can rest easy if the Fourth Circuit's decision goes unreviewed and is taken as a guide by other Circuits. Several examples make the point.

First, the University's Decision and Report contained direct evidence of a causal connection between the vestigial effects of *de jure* segregation, the contemporary attitudes of African Americans towards UMCP, and the present effects of those attitudes on their willingness to attend UMCP. The district court found the evidence "overwhelming" that UMCP continues to have a poor reputation among African Americans, attributable to its past discrimination, and that this poor reputation affects recruitment of African-American students. 838 F. Supp.

at 1084-87 (App. 54a-62a). The Fourth Circuit, however, trivialized this record evidence with the remark that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy." 38 F.3d at 154 (App. 10a). One can only wonder at this casual conflation of "mere knowledge of historical fact" with the specific cause-and-effect relationship that the University was offering evidence to establish and that the district court found to be established. This casual rejection of record evidence sends a dismaying signal to other institutions.

Second, the district court found that, by attracting "high-achieving black students" to the University, the Banneker Program "serves to enhance UMCP's reputation in the African-American community, increase the number of the African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus." 838 F. Supp. at 1095 (App. 83a). In rejecting this justification, the Fourth Circuit found it relevant to say: "High achievers, whether African-American or not, are not the group against which the University discriminated in the past." 38 F.3d at 158 (App. 20a). Again, one can only wonder at this statement when the record is undisputed that the University had previously excluded *all* African Americans, regardless of the level of their achievement.

Third, while UMCP had justified its program in part on the ground that Banneker Scholars would serve as mentors and role models for other African-American students, thereby attracting more African-American students —a justification the district court again found persuasive—the Fourth Circuit dismissed the contention on the ground that "[t]he Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy, as do we," citing *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 276 (1986) (plural-

ity opinion). 38 F.3d at 159 (App. 22a). *Wygant*, however, merely found that the school board's interest in providing minority role models for its minority students was insufficient to justify a lay-off program for teachers under which the percentage of minority teachers to be retained was tied to the percentage of minority students. That case cannot fairly be read as requiring the rejection of UMCP's role-model justification of the considerably narrower Banneker program—which grants financial aid to African Americans in numbers far below their representation at the University and which is merely one small part of the University's overall financial aid program.

Finally, having decided that the University's motion for summary judgment could not be granted because, in the Court's view, the program was not "narrowly tailored to remedy past discrimination," the Court failed to address UMCP's separate justification that the program was necessary to achieve the University's goal of a diverse student body and proceeded—on grounds that are difficult to decipher—to direct the district court to grant the plaintiff's motion for summary judgment. 38 F.3d at 161-62 (App. 28a-29a). Moreover, when the Fourth Circuit had discussed the diversity justification in its first decision in 1992, it had appeared to read *Bakke* as preventing a university from ever justifying a scholarship program limited to black students on the ground of achieving "genuine diversity." 956 F.2d at 56 n.4 (App. 103a n.4).

All agree that decisions of institutions of higher education to adopt race-specific or minority-specific scholarship programs are not immune from judicial review. Applicable precedent of this Court provides that there is a constitutional or statutory standard to be met. But the Fourth Circuit's decision goes far beyond that precedent in applying what it sees as the appropriate standard in such a way as to condemn almost any university's attempt to justify race-specific and minority-specific scholarship programs.

This Court should grant review of this case to ensure that the Fourth Circuit and other circuits do not, by the device of applying standards that cannot realistically be met, effectively outlaw race-specific and minority-specific scholarship programs.

## CONCLUSION

For all of these reasons, as well as the reasons set forth in the petitions, this Court should grant the petitions for writ of certiorari.

Respectfully submitted,

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